80-825

Supreme Court, U. S.
FILED
NOV 21 1980
MICHAEL RODAK, JR., CLERK

No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

SAMUEL A. BITHONEY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Questions Presented.

1. Whether a court in ruling on whether to admit a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy pursuant to Fed. R. Evid. 801(d)(2)(E) may consider the statement itself.

2. Whether a court in ruling on whether to admit evidence of other crimes, wrongs, or acts against a party pursuant to Fed. R. Evid. 404(b) as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident must find as a prerequisite to such admission that those other crimes, wrongs, or acts have been established by clear and convincing proof.

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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

SAMUEL A. BITHONEY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner Samuel A. Bithoney prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on September 24, 1980.

Citation to Opinion Below.

The opinion of the Court of Appeals, reprinted in Appendix A hereto, is unreported as yet. No opinion was rendered by the District Court.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

18 U.S.C. § 201(f),(g):

Bribery of Public Officials and Witnesses

"(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

"(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . . ."

18 U.S.C. § 371:

Conspiracy to Commit Offense or to Defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. § 1503:

Influencing or Injuring Officer, Juror or Witness Generally

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner (magistrate) or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner (magistrate) or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner (magistrate), or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner (magistrate), or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

28 U.S.C. Federal Rules of Evidence Rule 403:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

waste of time, or needless presentation of cumulative evidence."

28 U.S.C. Federal Rules of Evidence Rule 404(b):

Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

"(b) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

28 U.S.C. Federal Rules of Evidence Rule 801(d)(2)(E)

"(d) Statements which are not hearsay. A statement is not hearsay if—

"(2) Admission by a party-opponent. The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

Statement of the Case.

Petitioner, an attorney, appeals his conviction on an indictment charging two counts of conspiracy under 18 U.S.C. § 371.

The pertinent facts are summarized from the opinion of the court below:

The first court, premised on petitioner's alleged involvement in a sham marriage scheme and subsequent cover-up attempt, charged the petitioner and a co-defendant with conspiracy to defraud the United States Immigration and Naturalization Service and with conspiracy to influence a prospective grand jury witness in violation of 18 U.S.C. § 1503. The second count charged the petitioner with participation in a co-conspiracy with four other individuals, including an employee of the Social Security Administration of the

United States Department of Health, Education and Welfare, in a scheme to obtain Social Security cards fraudulently for illegal aliens in violation of 18 U.S.C. § 201(f) and (g). Upon the petitioner's motion, separate trials were held on each of the conspiracy counts, with the second count being tried first. The petitioner was found guilty on both counts and received a sentence of one year and one day on the first count and a concurrent sentence of two years on the second count (Appendix A at 11-12).

Reasons for Granting the Writ.

I. THERE IS A CONFLICT OF DECISIONS AMONG THE COURTS OF APPEALS AS WELL AS A CONFLICT OF DECISIONS BETWEEN THE COURTS OF APPEALS AND THIS COURT CONCERNING THE STANDARDS EMPLOYED IN THE ADMISSION OF A STATEMENT OF A CO-CONSPIRATOR AGAINST A PARTY DEFENDANT DURING THE COURSE AND IN FURTHERANCE OF THE CONSPIRACY PURSUANT TO EVIDENCE RULE 801(d)(2)(E).

Relying on its decisions in *United States* v. *Petrozziello,* 548 F. 2d 20, 23 (1st Cir. 1977) and *United States* v. *Martorano,* 557 F. 2d 1, 11 (1st Cir. 1977), *reh. denied,* 561 F. 2d 406 (1st Cir. 1977), *cert. denied,* 435 U.S. 922 (1978), the court below held that the district court properly admitted various co-conspirator statements against the petitioner, finding that both the existence of the conspiracy charged in the second count and the petitioner's participation therein had been shown, as required by *Petrozziello, supra,* by a preponderance of the evidence (Appendix A at 15-16). Among the factors cited by the court below in affirmance of the district court's ruling was the trial court's consideration of the actual co-conspirator statements seeking admission (Appendix A at 15-16).

The district court's consideration of the co-conspirator statements themselves has as its authority *United States* v. *Martorano, supra,* and *United States* v. *Petrozziello, supra.*

The Court of Appeals for the Eighth Circuit has expressly declined to follow the rule of the court below, insofar as it permits consideration of the statement seeking admission, on the ground that such a rule is an unwarranted "bootstrapping" procedure and that to permit it would be to abandon a vital safeguard. *United States* v. *Macklin,* 573 F. 2d 1046, 1048 n.2 (8th Cir. 1978), *cert. denied,* 439 U.S. 852 (1978); *United States* v. *Bell,* 573 F. 2d 1040, 1044 (8th Cir. 1978).

The Court of Appeals for the Ninth Circuit and the Court of Appeals for the Fifth Circuit hold to the view that proof independent of the statement seeking admission is essential. *United States* v. *Sandoval-Villalvazo,* 620 F. 2d 744, 747 (9th Cir. 1980); *United States* v. *Dunn,* 564 F. 2d 348 (9th Cir. 1977); *United States* v. *James,* 590 F. 2d 575, en banc (5th Cir.), *cert. denied,* 442 U.S. 917 (1979).

The District of Columbia Circuit and the Court of Appeals for the Second Circuit also take the position that proof independent of the co-conspirator statement offered against a defendant is required. *United States* v. *Gantt,* 617 F. 2d 831, 834 (D.C. Cir. 1980); *United States* v. *Stanchich,* 550 F. 2d 1294 (2d Cir. 1977); *United States* v. *Geaney,* 417 F. 2d 1116 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970).

This Court has consistently taught that as a preliminary matter to the admission of declarations by one defendant against other defendants, there must be substantial, independent evidence of a conspiracy among one or more other defendants and the declarant and the declarations at issue must have been in furtherance of that conspiracy. *United States* v. *Nixon,* 418 U.S. 683, 701 and n.14 (1974); *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942). In accord are the Courts of Appeals for the Fourth, Sixth and Seventh Cir-

cuits. See *United States* v. *Vaught*, 485 F. 2d 320, 323 (4th Cir. 1973); *United States* v. *Hoffa*, 349 F. 2d 20, 41-42 (6th Cir. 1965), *aff'd on other grounds*, 385 U.S. 293 (1966); *United States* v. *Santos*, 385 F. 2d 43, 45 (7th Cir. 1967), *cert. denied*, 390 U.S. 954 (1968).

Only this Court can resolve the present conflict of standards and insure that all persons are afforded uniform rights and concepts in all federal courts. Substantial rights of parties are at issue. The conflict among the Courts of Appeals is not imagined. It is expressly recognized. *United States* v. *Macklin*, supra.

II. There Is a Conflict of Decisions among the Courts of Appeals Concerning the Standards Employed in the Admission of Evidence of Other Crimes, Wrongs, or Acts as Proof of Motive, Opportunity, Intent, Preparation, Plan, Knowledge, Identity, or Absence of Mistake or Accident Pursuant to Evidence Rule 404(b).

The district court, on the first count, allowed in evidence, over objection, relating to the petitioner's role in six prior notice-waived marriages performed in a neighboring state, all involving aliens and all but one performed by the same justice of the peace who presided at the ceremonies at issue (Appendix A at 16-17). In affirming the ruling of the district court, the court below held that admission of the evidence of the previous marriages was proper to show the petitioner's knowledge of the mechanics of obtaining marriages in the neighboring state as well as his state of mind, that is, whether he participated in the marriages at issue with some knowledge of what it was all about and that it was not by accident (Appendix A at 16-17).

The court below rejected petitioner's claim of an insufficiency of evidence to prove his knowing participation in the sham marriage conspiracy without any reference to the

standard of proof required in such circumstances (Appendix A at 17-18).

In admitting the "other acts" evidence pursuant to Fed. R. Evid. 404(b) bearing on the issue of state of mind rather than establishment of identity, the trial court must find (1) that other acts to be proved involve the same state of mind as that presently alleged, (2) that the defendant committed the other acts, and (3) that, in accordance with Fed. R. Evid. 403, the probative value of the evidence substantially outweighs its potential prejudicial effect. *United States* v. *Beechum,* 582 F. 2d 898, 911-916 (5th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979); *United States* v. *Brashier,* 548 F. 2d 1315, 1325 (9th Cir. 1976), *cert. denied,* 429 U.S. 1111 (1977); Wright & Graham *Federal Practice and Procedure: Evidence* Section 5249 (1978); and see *United States* v. *Mann,* 590 F. 2d 361, 368-371 (1st Cir. 1978). As the first two required findings relate to relevancy, this is essentially a two-step analysis, *id.*

Because the relevance of other acts evidence is based upon an inference—that if (A) the defendant had the state of mind presently in question on other occasions, then (B) he had it on the instant occasion—it is essential that the proposition from which the inference is to be drawn have a solid foundation in fact. An inference can be drawn only from facts, and not from other inferences. Mathes, *Jury Instructions and Forms for Federal Criminal Cases,* 27 F.R.D. 39, 51 (1960); *Standard Acc. Ins. Co.* v. *Nicholas,* 146 F. 2d 376, 378 (5th Cir. 1944).

The first showing necessary to establish the relevance of other acts evidence is that the other acts are sufficiently similar to the crime alleged that they probably involved the same state of mind. If the other acts are not similar enough to permit this conclusion, the evidence must be excluded. *United States* v. *Mann, supra; United States* v. *Corey,* 566 F. 2d 429, 431-432 (2d Cir. 1977); *United States* v. *San Martin,* 505 F. 2d 918, 922 (5th Cir. 1974).

The second required showing is that the defendant committed the other acts. The Courts of Appeals are in disagreement regarding the standard by which the sufficiency of that proof is to be measured. The Courts of Appeals for the Seventh and Ninth Circuits use a "clear and convincing" standard. *United States* v. *Dolliole,* 597 F. 2d 102, 106 (7th Cir. 1979), *cert. denied,* 442 U.S. 946 (1979); *United States* v. *McPartlin,* 595 F. 2d 1321, 1344 (7th Cir. 1979), *cert. denied,* 444 U.S. 833 (1979); *United States* v. *Feinberg,* 535 F. 2d 1004, 1009 (7th Cir. 1976); *United States* v. *Moore,* 580 F. 2d 360, 364 (9th Cir. 1978); *United States* v. *Brashier, supra* at 1325.

The Court of Appeals for the Eighth Circuit subscribes to the clear and convincing standard as well. *United States* v. *Witschner,* 624 F. 2d 840, 843 (8th Cir. 1980); *United States* v. *Goehring,* 585 F. 2d 371, 373 (8th Cir. 1978); *United States* v. *Drury,* 582 F. 2d 1181, 1185 (8th Cir. 1978); *United States* v. *Jardan,* 552 F. 2d 216, 219 (8th Cir. 1977), *cert. denied,* 433 U.S. 912 (1977); *United States* v. *Davis,* 551 F. 2d 233, 234, 235 (8th Cir. 1977), *cert. denied,* 431 U.S. 923 (1977).

The Courts of Appeals for the Second and Fifth Circuits employ a "preponderance" standard in determining the sufficiency of proof other acts evidence. *United States* v. *Kahan,* 572 F. 2d 923, 932 (2d Cir. 1978); *United States* v. *Leonard,* 524 F. 2d 1076, 1090-91 (2d Cir. 1975); *United States* v. *Beechum, supra* at 913.

This conflict of decision between the Courts of Appeals should not be allowed to remain and develop further. There is no Supreme Court case on point. On the merits, petitioner urges this Court to adopt the "clear and convincing" standard of proof in the admission of other acts evidence in order to guarantee uniform standards and equal treatment of all litigants in the federal courts.

Conclusion.

For the foregoing reasons, petitioner respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Appendix A.

Opinion of the Court of Appeals.

United States Court of Appeals
For the First Circuit

No. 79-1362

UNITED STATES OF AMERICA,

APPELLEE,

v.

SAMUEL A. BITHONEY,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. RYA W. ZOBEL, *U.S. District Judge*]

Before COFFIN, *Chief Judge,*
CAMPBELL, *Circuit Judge,*
and CAFFREY,* *District Judge.*

John P. White, Jr., with whom *Michael H. Riley* and *White, Inker, Aronson, Connelly & Norton, P.C.*, were on brief, for appellant.

Amos Hugh Scott, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

September 24, 1980

CAMPBELL, *Circuit Judge.* Samuel Bithoney, a Boston attorney, appeals his conviction on two counts of conspiracy under 18 U.S.C. § 371. The first count, premised on

* Of the District of Massachusetts, sitting by designation.

Bithoney's alleged involvement in a sham marriage scheme and subsequent cover-up attempt, charged Bithoney and co-defendant Lee Christo with conspiring to defraud the Immigration and Naturalization Service and with conspiring to influence a prospective grand jury witness. The Count II conspiracy centered around Bithoney's alleged participation, with four others, in a scheme to obtain Social Security cards fraudulently for illegal aliens. Upon Bithoney's motion, separate trials were held on each of the conspiracy counts, with Count II being tried first. Bithoney was found guilty on both counts, receiving a sentence of one year and one day on the first count and a concurrent sentence of two years on Count II.

I.

We address Bithoney's varied contentions in the context of each separate count of the indictment, turning first to those raised under the earlier tried second count. Bithoney challenges as error the district court's denial of his motion to suppress various documents seized, pursuant to a warrant, during a search of his Boston law office. Bithoney contends the warrant was defective. It provided for the seizure of the following items from his office:

> "[A]ll notes, memoranda, correspondence, passports, documents, copies and originals of Social Security Administration Forms SS-5, records of payments received, bills or invoices, and other papers, relating to the following individuals: 1. Joseph John Comperchio, 2. Antonio Leone, 3. Luis Alberto Mardones, 4. Takis Angelos Koutsouris, 5. Yolanda Maria Nevarez, 6. Thomas Savvas, 7. Joseph Gebrael, 8. Juana Celida Batista, 9. Geronimo H. Buonocore, 10. Cesar A. Cerrudo, 11. Nicola Elia, 12. Norma Elia, 13. Angeliki Sipsa, 14. Nidia Gatica a/k/a Nidia Elena Palma, 15. Mr. Gatica, 16. Vic-

> tor Antonio Brites, 17. Algonsina Romano Cocciolo Brites, all of which said documents constitute evidence, fruits and instrumentalities of the crime of conspiracy to defraud the United States Social Security Administration, in violation of 18 U.S.C. § 371."

We think the warrant was adequate, comporting with standards discussed in recent opinions of this circuit. *See United States* v. *Brien,* 617 F.2d 299 (1st Cir. 1980); *United States* v. *Roche,* 614 F.2d 6 (1st Cir. 1980); *United States* v. *Abrams,* 615 F.2d 541 (1st Cir. 1980); *In re Lafayette Academy, Inc.,* 610 F.2d 1 (1st Cir. 1980). It undertook to narrow and identify the documents subject to seizure, breaking them down into specific categories.[1] This practice minimized the likelihood of random excursions by the executing officers. *Compare Lafayette Academy, supra,* 610 F.2d at 4, n.4. The warrant also restricted seizable materials to documents relating to 17 named individuals—a further significant limitation on its scope, which reduced the likelihood of a general rummaging expedition. *Compare United States* v. *Abrams, supra,* 615 F.2d at 550 (Campbell, J., concurring). And finally, the warrant identified with some particularity the object of the conspiracy under investigation. *Compare Lafayette Academy, supra,* 610 F.2d 1; *United States* v. *Roche, supra,* 614 F.2d 6.

Bithoney, indeed, makes no allegation that the warrant is not sufficiently particular in its descriptive language. Rather, he urges only that the warrant's final qualifying phrase—"all of which said documents constitute evidence, fruits and in-

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[1] The "other papers" language qualifying the earlier described seizable documents gives us little pause, as "the 'general' tail of the search warrant will be construed so as not to defeat the 'particularity' of the main body of the warrant." *United States* v. *Abrams,* 615 F.2d 541, 547 (1st Cir. 1980). *See also* the warrant in issue in *Andresen* v. *Maryland,* 427 U.S. 463 (1976).

strumentalities of the crime of conspiracy to defraud the United States Social Security Administration . . ."—is fatally defective. Basically, Bithoney's argument is that the warrant does not simply authorize the seizure of documentary evidence of the specified crime, but rather goes much further by indicating that all documents relating to the named individuals are, in fact, evidence of the conspiracy alleged, and hence subject to seizure. Viewed in this light, the warrant, Bithoney argues, exceeds the scope of the underlying probable cause, as not all documents located in his law office relating to the named individuals could reasonably be assumed to be connected with the conspiracy charged. *See United States* v. *Abrams, supra,* 615 F.2d at 548-49 (Campbell, J., concurring).

Bithoney's proposed reading of the challenged warrant language is "hypertechnical." *Cf. United States* v. *Ventresca,* 380 U.S. 102, 108-09 (1965). The phrase beginning "all of which said documents," though perhaps not drafted "with the niceties required in fields like conveyancing and estate planning," *id.* at 550, is most reasonably read as directing the officers to seize only those specified documents relating to the named individuals which are evidence of the described conspiracy. If the warrant was meant, as Bithoney urges, simply to direct the officers to seize any and all items relating to the 17 named individuals, it would have been unnecessary to restrict the scope of the search by specifying, as the warrant actually did, the various categories of seizable documents and the nature of the conspiracy involved. We think the warrant adequately focused the search and seizure upon just those documents likely to evidence the described conspiracy. The warrant adequately "circumscrib[ed] the discretion of the executing officers" and "inform[ed] the person subject to the search and seizure what the officers [were] entitled to take." *Lafayette Academy, supra,* 610 F.2d at 5. There was no fourth amendment violation.

Bithoney contends that under the standards announced by this court in *United States* v. *Petrozziello,* 548 F.2d 20 (1st Cir. 1977), there was insufficient evidence of his participation in the alleged conspiracy to support the admission of various co-conspirator statements against him. The district court, on the sixth day of the 14 day trial of the second count, granted the government's request for admission, determining that both the existence of the conspiracy and Bithoney's participation therein had been shown, as required by *Petrozziello,* by a preponderance of the evidence. The court, in support of its ruling, noted: Bithoney's participation in a December 4, 1979 meeting with his son Albert and a government informant at which time Albert passed to the informant social security applications for fraudulent processing as well as cash payments as remuneration for such processing; a November 16, 1979 telephone conversation between Bithoney and the informant in which Bithoney, though ultimately referring the caller to his son, indicated his familiarity with the caller and the scheme, and in no way disassociated himself with the scheme; the fact that nearly all the key events and transactions relating to the scheme took place in Bithoney's law office, where Bithoney, the sole attorney, worked with his two sons; the fact of the family relationship existing between Bithoney and his son Albert, the latter being, in the court's words, "the banker" for the scheme.

We have reviewed the relevant portions of the record and conclude that the district court's finding, by a preponderance, of the existence of a conspiracy and Bithoney's participation therein, are amply supported. Evidence introduced subsequent to the court's *Petrozziello* ruling only further in-

dicates that the threshold standard of admissibility prescribed by that case was met here.[2]

II.

Bithoney was charged and convicted under Count I in part for his role in a scheme whereby sham marriages with United States citizens were arranged for two aliens in order that they might defeat the immigration laws and fraudulently obtain permanent resident status. The marriages were performed in New Hampshire by a justice of the peace, following the obtaining of a waiver of the usual five day notice and waiting requirement. Bithoney made many of the necessary arrangements for the ceremonies and paid various fees and the like. Bithoney challenges both the district court's admission of evidence and the sufficiency of the evidence bearing on his knowledge of the fraudulent nature of the overall plan.

The government introduced, over objection, evidence of Bithoney's role in six prior notice-waived New Hampshire marriages, all involving aliens and all but one performed by the same justice of the peace who presided at the present ceremonies. The district court at first allowed this evidence to be developed solely to show Bithoney's knowledge of the mechanics of obtaining marriages in New Hampshire. Later, however, following the introduction of evidence of the details of the various previous marriages, the court instructed the jury that it could consider the prior marriages as bearing on Bithoney's state of mind, that is, "whether he participated in

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[2] In *United States* v. *Ciampaglia,* No. 79-1269 (1st Cir. Aug. 4, 1980), decided after Bithoney's trial and after oral argument before this court, we amplified our *Petrozziello* decision and held that trial courts should "delay *Petrozziello* rulings until the conclusion of all the evidence. . . ." Slip op. at 8. Failure to do so, however, is not plain error where, as here, no objection on this ground was rendered and the whole record supports the ruling. *Id.*

the [present ceremonies] with some knowledge of what this was all about, that it was not an accident." Bithoney argues, however, that as the prior marriages were not proven to be fraudulent, that is, arranged *solely* for immigration purposes, the evidence of his participation therein was basically irrelevant and the injection of those prior events into the present controversy erroneous.

We think it unlikely the court exceeded its discretion in admitting this evidence. *See United States* v. *Corey,* 566 F.2d 429, 431 (2d Cir. 1944); 10 Moore's Federal Practice § 404.2[2] at IV-114. Given such suspicious facts as Bithoney's role in arranging the various ceremonies, his personal attendance at the marriages, the regular use of the same New Hampshire justice of the peace, and the relatively large number of marriages, we think a jury was entitled to consider these events, along with the other evidence, in passing on Bithoney's knowledge. *See generally,* II Wigmore § 302 (Chadbourn Revision); McCormick on Evidence § 190 (2d ed.). We need not, however, linger over the question whether the proferred evidence was properly admitted. Even were we to assume that error was committed, the error was harmless. *See United States* v. *Bosch,* 584 F.2d 1113, 1117 (1st Cir. 1978). Bithoney introduced considerable evidence designed to show that the earlier marriages were not arranged solely for immigration purposes; the jury was fully capable of recognizing that these earlier events, by themselves, were of limited probative value. Moreover, the district court, in its final instructions, narrowly limited the use of this evidence.[3] And

[3] The district court, perhaps overcautiously, instructed, for example, that evidence of the prior New Hampshire marriages "may not be considered . . . in determining whether [Bithoney] did what the indictment charges. In fact, it may not be considered at all unless you [the jury] first find that he did, in fact, participate at all unless you [the jury] first find that he did, in fact, participate in the conspiracy with which he is charged here and that he did, in fact, in some way participate in a conspiracy on arranging false marriages in New Hampshire.

most importantly, there was strong and persuasive other evidence to establish Bithoney's knowledge of the fraudulent nature of the marriage scheme. We entirely reject Bithoney's claim of an insufficiency of evidence to prove his knowing participation in the sham marriage conspiracy. The evidence against Bithoney included not only the extremely unusual and suspicious circumstances surrounding the marriage ceremonies and Bithoney's assistance in arranging those ceremonies (including paying various fees), but as well some highly damning correspondence sent to Bithoney by his co-defendant Lee Christo. Additionally, there was evidence of incriminating behavior and comments by Bithoney made after it became apparent to him that the authorities were likely aware of his involvement in the scheme.

Similarly, Bithoney's contention that there was insufficient evidence to demonstrate his involvement in a conspiracy, also charged in Count I, to influence a prospective grand jury witness who was to testify concerning the marriage scheme is not borne out by the record. While it may be that the evidence of the acutal attempt at obstruction by Bithoney and co-defendant Christo was stronger than the evidence of their conspiracy to do so, the evidence of the latter was sufficient. This included the facts of Bithoney's prior involvement with Christo in the marriage scheme itself, his five to ten minute meeting with Christo immediately prior to the obstruction attempt, and the joint comments by Bithoney and Christo urging the prospective witness to fail to testify forthrightly. That the proof of conspiracy was largely circumstantial is immaterial. *See Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *Dirring* v. *United States,* 328 F.2d 512, 515 (1st Cir.), *cert. denied,* 377 U.S. 1003 (1964); *United States* v. *Zozlio,* 617 F.2d 314, 316 (1st Cir. 1980).

Affirmed.